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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-746

CHARLES N. BUCHHOLTZ AND LESTER J. TAUER,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

SWIFT & COMPANY AND AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Restatement of Questions Presented	1
Counterstatement of the Case	2
Bargaining History and Closing Benefits	3
Past Practice	5
Evaluation of the Grievance's Merits	6
The Settlement	7
Proceedings Below	8
Reasons for Denying the Writ	10
I. The Unfair Representation Issue Was Properly Decided Below by Applying the Decisions of This Court to Disputed Factual Conclusions	10
II. Petitioners' Damage Claim Against Amalgamated	13
III. Interpretation of the Vacation Pay Provision of the 1967-1970 Collective Bargaining Agreement Between Swift and Amalgamated Has No Precedent Value	13
IV. Petitioners' Suggestion That a Special Standard of Review Should Be Applied to Unfair Representation Cases Is Without Merit	16
Conclusion	17

Table of Authorities

Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971) 12

Brackett v. Easton Boot & Shoe Co., 399 S.W.2d 842 (Mo. 1965) 14

Briggs v. Electric Auto-Lite Co., 37 Wisc.2d 275, 155 N.W.2d. 32 (1967) 14

Corcoran v. Allied Supermarkets, Inc., 498 F.2d 527 (8th Cir. 1974) 12

Cunningham v. Erie Railroad Co., 266 F.2d 411 (2nd Cir. 1959) 12

Div. of Labor Law Enforcement v. Mayfair Markets, 102 Cal. App.2d Supp. 943, 227 P.2d 463 (1951) .. 14

Div. of Labor Law Enforcement v. Standard Coil Prod. Co., Inc., 136 Cal. App.2d Supp. 919, 288 P.2d 637 (1955) 14

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 12

Givhan v. Federated Metals Division, American Smelting & Refining Co., 364 Mich 370, 110 N.W.2d 763 (1961) 14

Humphrey v. Moore, 375 U.S. 335 (1964) 12

In Re Las Colinas, Inc., 426 F.2d 1005 (1st Cir. 1970) .. 8

Int'l Union v. L. T. Patterson Co., 8 Ohio 2d 334, 159 N.E.2d 923 (1956) 14

Kelson v. United States, 503 F.2d 1291 (10th Cir. 1974) . 8

Local 186, United Packinghouse Food & Allied Workers v. Armour & Co., 446 F.2d 610 (6th Cir. 1971) 15

Local Lodge 2040, International Association of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959) 14,15

In Re Telemart Enterprises, Inc., 524 F.2d 761 (9th Cir. 1975) 8

Roberts v. Ross, 344 F.2d 747 (3rd Cir. 1265) 8

Saxis Steamship Co. v. Multifacs International Traders, Inc., 375 F.2d 577 (2nd Cir. 1967) 17

Simberlund v. Long Island Rail Road Co., 421 F.2d 1219 (2nd Cir. 1970) 12

Smith v. Kingsport Press, Inc., 366 F.2d 416 (6th Cir. 1966) 15

Treloar v. Steggeman, 333 Mich. 166, 52 N.W.2d 647 (1952) 14

Tynan v. KSTP, 247 Minn. 168, 77 N.W.2d 200 (1956) . 14

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 8

United States v. Marine Bancorporation, 418 U.S. 602 (1974) 8

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 16

Vaca v. Sipes, 386 U.S. 171 (1967) 11,13

Arbitral Decisions

Barg & Foster, Inc., 53 Lab. Arb. 692 (1969) (Seitz, Arb.) 14

Cricket Shop of Cedarhurst, 49 Lab. Arb. 895 (1967) (Singer, Arb.) 14

Ekco Product Co., 54 Lab. Arb. 66 (1969) (Kabaker, Arb.) 14

Wagner Electric Corp., 54 Lab. Arb. 232 (1970) (Erps, Arb.) 14

Whittet-Higgins, Co., 15 Lab. Arb. 13 (1949) (Healey, Arb.) 14

Miscellaneous

American Heritage Dictionary of the English Language (1973) 11

Federal Rules of Evidence, Rule 408 6

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PRELIMINARY STATEMENT

Respondent Swift & Company opposes the Petition for Writ of Certiorari. The opinions below, Statement of Jurisdiction and statutory provisions involved are correctly stated by petitioners.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should second guess the advice of Amalgamated's attorneys—that the vacation pay grievance would be lost in arbitration and Amalgamated's decision to heed that advice and settle the grievance on the best terms it could negotiate—and find Amalgamated guilty of unfair representation.

2. Assuming that Amalgamated breached its duty of fair representation and that Swift did not breach the collective bargaining agreement, whether Amalgamated should be required to pay the petitioners' attorneys fees and costs in their unsuccessful attempt to prove a breach of the bargaining agreement.

3. Whether general principles of contract law require Swift to pay 1970 vacation pay to the petitioners when under the plain language of the collective bargaining agreement, its bargaining history and past practice the petitioners are not entitled to it.

4. Whether this Court by case law should retroactively establish a new standard of appellate review unique to unfair representation cases.

COUNTERSTATEMENT OF THE CASE

The petitioners' statement of the case is argumentative and omits essential facts including the pertinent contract language. Because this suit, largely involves disputes about conclusions to be drawn from the facts a more detailed statement is needed. The facts stated in petitioners' brief will not be repeated except to the extent necessary to make a coherent statement.

In November of 1969 Swift & Company closed most of its South St. Paul, Minnesota meat packing plant. The Amalgamated Meat Cutters and Butcher Workmen of North America (hereinafter Amalgamated or the Union) filed a grievance for benefits allegedly lost as a result of the closing including the vacation pay they would have received in 1970 if the plant had remained open. The collective bargaining agreement (Master Agreement) between Amalgamated and Swift provided a five-step grievance procedure culminating in arbitration. Swift adamantly rejected the vacation pay claim because the employees had not qualified under the Master Agreement.

The Master Agreement provided an employee was entitled to vacation pay:

> On December 28, provided that during the preceding 365 calendar days he has completed 270 calendar days on the payroll and provided that on said December 28 he is being carried on the active payroll;
> Vol. V 2336.[1]

The petitioners did not qualify for 1970 vacation pay because they were not on the active payroll on or after December 28, 1969.

BARGAINING HISTORY AND CLOSING BENEFITS

Every two to three years between 1948 and 1967 the Master Agreement between Amalgamated and Swift was renegotiated. Every Agreement since 1948 provided that an employee only qualified for a vacation by working a specified number of days and by being on the active payroll on a specified date. Vol. IV 2862-2904. During virtually every bargaining session the Union negotiated without success to eliminate the qualifying date and to substitute a pro rata vacation provision. The petitioners were aware of these attempts, participated in them and knew they were unsuccessful. Vol. III 1077-78. During 1967 contract negotiations the Union demanded "that the requirement in Para. 32 of being on the payroll on December 28 be deleted." Vol. I 85. The Union was unsuccessful.

Union and Swift officials testified that demands for pro rata vacation pay included employees severed as a result of plant closings. The Union's legal counsel, Mr. Irving King, who attended numerous collective bargaining negotiation sessions testified:

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[1]The district court record in the court of appeals consisted of Volumes I through VI and will be referred to in this manner. Reference to the printed appendix to the Petition for Certiorari will be by the abbreviation "App." followed by the page number.

> [T]his was a period of time in which the Union was negotiating a whole package of provisions for protection of employees in the event of plant close-downs as the matters I've mentioned, including inter-plant transfer, moving allowance, notice of closing and those matters, and it was in this context that these vacation pay changes were proposed also. Vol. IV 1785.

During Master Agreement negotiations in the 1950's and 1960's, Amalgamated was well aware of the problems caused by plant closings and constantly negotiated for improved closing benefits including pro rata vacations. Vol. IV 1750-53. Although it was not successful in obtaining pro rata vacations, Amalgamated did obtain many other concessions from Swift and, as a result, employees terminated when the South St. Paul plant closed received the following Master Agreement benefits:

1. The right to transfer to another plant — 190 employees took advantage of this right and transferred.

2. The opportunity to be placed on Company-wide waiting lists for job openings at new plants — 65 employees placed their names on the waiting list.

3. The right to a pension — 370 employees went on pension.

4. The right to substantial separation allowance — 561 employees received a total of $3,866,476.20 in separation allowances.

5. The right to 26 weeks advance notice of plant closings—although Swift wanted to close the plant on May 29, 1969, as a result of this requirement 1,500 employees received an additional 26 weeks of work and 26 weeks of pay.

6. The right to an eight-week gratuity payment—370 employees received a total of $489,264.95 in eight week gratuity payments.

Vol. VI 2772-73, Vol. I 78.

Termination benefits for the South St. Paul employees totaled $4,606,901.91. Vol. VI 2772. These benefits were part of the quid pro quo for the employees' last year of work. Pro rata vacations were not. The court of appeals noted, "This is a clear indication that the negotiators were aware of the many monetary consequences of closing the plant, but did not agree on an exception to the requirement of being on the payroll on December 28 for vacation pay purposes." App. A-21. If the plaintiffs now receive vacation pay, they will receive benefits they could not obtain at the bargaining table.

PAST PRACTICE

Between 1949 and 1969 Swift closed more than thirty-five meat packing plants throughout the United States under circumstances similar to those in South St. Paul. In each instance Swift, acting in accordance with the Master Agreement, did not pay vacation benefits for the subsequent year to employees who were not on the active payroll on the qualifying date. Vol. VI 2749. Similarly, thousands of employees who terminated for reasons unrelated to closings did not receive vacation pay if they were not on the active payroll on the qualifying date. Vol. VI 2755.

In flagrant disregard of Rule 408 of the Federal Rules of Evidence, which provides that settlements are not admissible, the district court received, over objection, the settlement of an unrelated vacation pay dispute resulting from Swift's closing a plant in Sioux City, Iowa.[2] It was on this unique settlement

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[2]Because of the proximity of Sioux City to Omaha, employees threatened to transfer en masse for one week to collect vacation pay. Although the Omaha plant was open and operating, its employees had also been given a six-month closing notice. The Master Agreement provided in effect that once such a notice was given, Swift could not lay off any employees. Swift was faced with a double work force at Omaha if the Sioux City employees transferred. Because of the unique situation Swift agreed to a settlement awarding vacation pay to certain employees. Vol. IV 1677-79.

agreement that the district court premised its interpretation of the contract. Vol. V. 2379. In addition to the prohibition of Rule 408, the Agreement itself provided it would not and could not be construed as a precedent. The court of appeals noted, "In view of that express language, applicable to both union and company, and in view of the special circumstances involving a short distance to travel and only one week of duty required, we are unwilling to consider it at all in interpreting the collective bargaining agreement between them." App. A-16 n.9.

EVALUATION OF THE GRIEVANCE'S MERITS

Every Union official connected with processing the grievance concluded long before settlement was discussed that the vacation pay grievance would not be won in arbitration. This included local union officials and Amalgamated officials in the Minneapolis office and at Amalgamated headquarters in Chicago. The named class representatives admitted this assessment was reasonable. Tauer testified that it was not unreasonable for the Union to consider the grievance a loser and Buchholtz testified, "[I]t [was] worth a shot in the dark, as I see it. . . ." Vol. IV 1601-02.

Eugene Cotton and Irving M. King, the two principal Amalgamated attorneys, also concluded the vacation pay grievance would be lost in arbitration. Vol. IV 1759-60, 1904. Before settlement discussions had commenced Mr. King explained the basis of this opinion to the Amalgamated official in charge of the grievance:

> The reasons for the opinion were principally that — and these are the reasons I told him — there had been this prior bargaining history in which the Union had been attempting, year after year, to have the contract changed in order to allow vacations in these circumstances. I told him that the contract with Swift & Company is unique in the packinghouse industry in that it requires that a person be on the active payroll on a certain date in order to receive vacations. I told him that there was no other major contract in the packinghouse industry in which this was a requirement. I mentioned specifically the Armour contract and the Wilson contract, and I told him that I had not ever seen a case with — an arbitration decision with a contract identical to this one that had ever been won by a Union.
>
> For these various reasons, I expressed the view that I thought it extremely unlikely that we could win this case and I did not think the grievance had merit. Vol. IV 1759-60.

The opinions of these attorneys were based on years of experience in labor law including the arbitration of over 400 grievances.

THE SETTLEMENT

With this evaluation in the background Amalgamated and Swift settled the vacation pay grievance a production incentive grievance and two seniority grievances arising out of the South St. Paul plant closing.[3] The members of the grievance committee who negotiated the settlement did not personally benefit. The settlement provided for withdrawal of the grievances, forfeiture of separation pay by employees receiving benefits under the settlement and the payment of pension-like benefits to employees who had thirty years or more of service but had not yet reached retirement age. Vol. VI 2472-77. The plight of those employees had been of utmost concern to Swift and the Union. Vol. III 1209. On other occasions, special arrangements had also been made to secure special pension benefits for people in closings. Vol. IV 1668-71.

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[3]The petitioners were not even potential beneficiaries of the production incentive and seniority grievances. The production incentive grievance had a potential value of $200,000. Vol. IV 1653.

Out of a work force of approximately 250 remaining employees, 67 were eligible for pension benefits as a result of the settlement. Vol. I 48-51. Forty-four accepted the pension benefits and in return gave up their separation pay. Vol. I 42-3, Vol. IV 1660.

Although the district court adopted a Finding, written by the petitioners, that the settlement cost Swift $928,000.00, the Finding was unsupported. Vol. 1 150. Mr. Tagg, a Swift employee who helped negotiate the settlement, testified the settlement cost Swift little or nothing. His calculation took into consideration that employees would be giving up substantial amounts of separation pay and that most of the cost would be paid by an independent pension fund rather than out of Swift's profits. Tagg was not concerned with the cost to the pension fund. Vol. III 1223-25, Vol. IV 658-59, 1702-09.

PROCEEDINGS BELOW

On October 20, 1975, the district court filed Findings of Fact and Conclusions of Law on the general liability issues in favor of the petitioners. Vol. I. 124. The district court erased from the contract the December 28th qualification date, thereby accomplishing what the Union had unsuccessfully tried to do at the bargaining table for over 20 years! The court adopted virtually without change the Findings of Fact and Conclusions of Law written and submitted to the court by petitioners' counsel months before trial.[4]

[4] During oral argument the court of appeals criticized this practice. Such "mechanically adopted" Findings have also been criticized by other circuit courts and this Court because they are not the product of the district judge's mind and "do not reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 615 n. 13, (1974); *In Re Telemart Enterprises, Inc.*, 524 F.2d 761 (9th Cir. 1975); *Kelson* v. *United States*, 503 F.2d 1291 (10th Cir. 1974); *In Re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747 (3rd Cir. 1965).

The district court made and entered its own additional Findings of Fact and Conclusions of Law on May 12, 1977, November 18, 1977, December 1, 1977, February 28, 1978 and July 7, 1978. Vol. I 162, 168, 290, 296, 306. These subsequent Findings were, in several instances, in direct conflict with the initial Findings adopted by the court but written by petitioners' counsel. The district court did not write a memorandum or opinion explaining its decision.

The court of appeals, reversing the judgment of the district court, held that Swift did not breach the collective bargaining agreement in refusing to pay the petitioners' 1970 vacation pay and that Amalgamated did not breach its duty of fair representation in settling the vacation pay grievance. App. A5-23.

REASONS FOR DENYING THE WRIT

I.

The Unfair Representation Issue Was Properly Decided Below By Applying The Decisions Of This Court To Disputed Factual Conclusions.

Petitioners theorize the court of appeals overlooked the district court's Findings of Amalgamated's alleged bad faith, hostility, discrimination, political favoritism and all sorts of other wrongs. Petitioners' Brief for Certiorari at 18. The appeals court, however, carefully reviewed the 3,000 page record below and determined the Findings were unsupported. App. A22-23. The district court Findings were written by the petitioners with a shotgun before the trial had even begun. Further review of these Findings would have no precedent value.

Petitioners plead that the court of appeals misapprehended the basis of the district court's Finding of bad faith when it concluded that the cornerstone of the Finding was the district court's legal conclusion that the grievance was meritorious. Petitioners argue that since the district court's finding of unfair representation ostensibly applied even to the subclasses for which the court found no breach of contract, the alleged breach could not have been the cornerstone of the bad faith Finding. The generalized Finding of unfair representation was adopted by the district court long before it ruled that certain subclasses were not entitled to vacation pay. From the bench the district court explained in its own words the "cornerstone" of its decision:

> I think the basis for the direction to the Union is that arbitration, which was provided for and requested, should have been held and none of us would have been here for another four or five years, possibly . . . .

* * * *

> . . . This is not a petty grievance. [the vacation pay claim] I agree the Union can't be required to go through an arbitration procedure on every petty grievance but this is a substantial matter. Vol. II 541-42.

In addition to concluding that the district court's decision on the merits of the grievance was the cornerstone of its bad faith Finding, the court of appeals found generally "no clear showing had been made of bad faith. . . . " App. A-22.

Petitioners contend the court of appeals' decision "rendered the 'arbitrary' conduct standard of unfair representation meaningless" because it was arbitrary to settle the vacation pay grievance and several other grievances in return for pension benefits. Petitioners' Brief for Certiorari at 12. The American Heritage Dictionary of the English Language (1973) defines "arbitrary" as "determined by whim or caprice." Amalgamated was not acting whimsically or capriciously when it heeded the advice of its experienced labor lawyers that the grievance would be lost in arbitration. On the contrary, it would have been arbitrary for Amalgamated to push forward, ignoring a beneficial settlement, after concluding it could not win. The reasonableness of Amalgamated's evaluation of the grievance is underscored by the appeals court's decision that there was no breach of contract. It would be bizarre indeed if Amalgamated were judged irrational or arbitrary for coming to the same conclusion as the court of appeals.

Even if this Court were to find a breach of contract, that decision would not detract from the good faith reasoned nature of Amalgamated's decision, and it would be improper to second guess that decison. In *Vaca* v. *Sipes,* 386 U.S. 171, 192-3 (1967) this Court held:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or

> jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

This position was emphasized in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge,* 403 U.S. 274, 301 (1971):

> [T]he doctrine . . . [of breach of duty of fair represention] carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . . . [T]he very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct [in allegedly misconstruing a contract], on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.

The record is devoid of any evidence that Amalgamated acted out of hostility or irrationally.

The petitioners' analogy of a union settling competing claims to an attorney settling the claim of one client in return for benefits to another client is nonsensical. While an attorney would breach the Code of Professional Responsibility in representing conflicting interests, a union is charged with doing just that. This Court and several courts of appeal have approved similar settlements in which the disputed claim of one group is settled in return for benefits to another group. *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953); *Corcoran* v. *Allied Supermarkets, Inc.,* 498 F.2d 527 (8th Cir. 1974); *Simberlund* v. *Long Island Rail Road Co.,* 421 F.2d 1219 (2nd Cir. 1970); *Cunningham* v. *Erie Railroad Co.,* 266 F.2d 411 (2nd Cir. 1959).

Amalgamated's judgment that the settlement was the very best it could negotiate should not be second guessed. Although petitioners claim a different settlement would have been better, Swift would not have agreed to anything else. The settlement was agreeable to Swift because of several unique features: (1) it involved withdrawal of *all four* grievances not just the vacation pay grievance, (2) Swift was sympathetic to the plight of employees who fell just short of qualifying for a pension and (3) for the most part the cost of the settlement came out of a pension fund and not out of profits.

II.

Petitioners' Damage Claim Against Amalgamated

For the first time in its motion for a rehearing in the Eighth Circuit, petitioners' attorneys demanded that Amalgamated pay them attorneys' fees even if there was no breach of contract because Amalgamated was still guilty of unfair representation. Since the claim is not against Swift, a response is not necessary.

III.

Interpretation of the Vacation Pay Provision of the 1967—1970 Collective Bargaining Agreement Between Swift and Amalgamated Has No Precedent Value

Procedurally the contract issue is hopelessly entangled with the unfair representation issues. Unless this Court grants certiorari on the unfair representation issue and reverses the decision below, the vacation pay settlement is unreviewable. *Vaca* v. *Sipes, supra.* Petitioners argue certiorari should be granted on the vacation pay issue because the court of appeals was wrong, and because there is a split of authority between two circuits.

The court of appeals decision was correct. It was based upon the plain language of the contract, supporting bargaining history and past practice. The parties were well aware of the

monetary consequences of plant closings and did not make an exception to the vacation qualifying date for closings. The appeals court's reasoning is supported by decisions of other circuits, state courts and arbitrators. *Local Lodge 2040, International Association of Machinists* v. *Servel, Inc.*, 268 F.2d 692 (7th Cir. 1959); *Division of Labor Law Enforcement* v. *Standard Coil Prod. Co., Inc.*, 136 Cal. App.2d Supp. 991, 288 P.2d 637 (1955); *Division of Labor Law Enforcement* v. *Mayfair Markets,* 102 Cal. App. 2d Supp. 943, 227 P.2d 463 (1951); *Givhan* v. *Federated Metals Division, American Smelting & Refining Co.*, 364 Mich. 370, 110 N.W.2d 763 (1961); *Treloar* v. *Steggeman,* 333 Mich. 166, 52 N.W.2d 647 (1952); *Tynan* v. *KSTP,* 247 Minn. 168, 77 N.W.2d 200 (1956); *Brackett* v. *Easton Boot & Shoe Co.*, 399 S.W.2d 842 (Mo. 1965); *Briggs* v. *Electric Auto-Lite Co.*, 37 Wisc. 2d 275, 155 N.W.2d 32 (1967); *International Union* v. *L. T. Patterson Co.*, 8 Ohio 2d 334, 159 N.E.2d 923 (1956); *Wagner Electric Corp.*, 54 Lab. Arb. 232 (1970) (Erps, Arb.); *Barg and Foster, Inc.*, 53 Lab. Arb. 692 (1969) (Seitz, Arb.); *Ecko Prod. Co.*, 54 Lab. Arb. 66 (1969) (Kabaker, Arb.); *Cricket Shop of Cedarhurst,* 49 Lab. Arb. 895 (1967) (Singer, Arb.); *Whittet-Higgins, Co.*, 15 Lab. Arb. 13 (1949) (Healey, Arb.)

Resolution of the vacation pay question has no precedent value. The reason for this is summarized in the Eighth Circuit's opinion. "Our job is to ascertain as authoritatively and as accurately as possible the intent of these private parties in the agreement." App. A-17. The court examined the contract and the pertinent past practice and bargaining history. From this examination the court concluded that petitioners were not entitled to 1970 vacation pay because that was not the parties' intent. This examination and its outcome does not involve important, novel or doubtful questions of law. It is extremely unlikely that a similar contract exists. There was testimony during trial that the contract was unique in the packinghouse industry. The Swift Master Agreement was rewritten in 1973 eliminating the disputed provision. Vol. VI 2919.

Based upon certain Sixth Circuit cases the petitioners argue certiorari should be granted because there is allegedly a split between circuits. In none of the Sixth Circuit cases awarding vacation pay was there a contractual requirement of being on the active payroll on a certain day. In *Local 186, United Packinghouse Food & Allied Workers* v. *Armour & Co.,* 446 F.2d 610 (6th Cir. 1971), cited by petitioners, the company petitioned for certiorari claiming a split between circuits based upon the Seventh Circuit decision in *Local 2040,* v. *Servel, supra.* The *Servel* decision held that employees were not entitled to vacation pay for the year following a plant closing. The results were different not because the circuits were at logerheads but because the contracts were different and accordingly certiorari was denied in *Armour.* 405 U.S. 955 (1972). As the *Armour* court noted, "[H]ad . . . [the parties] desired to alter the case law, they should have done so by explicit language." 446 F.2d at 618. In *Smith* v. *Kingsport Press, Inc.,* 366 F.2d 416, 418 (6th Cir. 1966), a Sixth circuit case not cited by the petitioners, the court recognized what explicit language is when it said, "Thus, we have remaining the principal issue, i.e., whether the employees in question were 'on the payroll.' Obviously, alternative terms could have been used in the collective bargaining agreement. The most obvious of which would have been *'on the active payroll'* or 'actually working on the 4th Friday in March'." (emphasis added). Swift's Master Agreement with Amalgamated contained the language recognized by the Sixth Circuit as "most obvious."Based upon this analysis, there is every reason to believe that if this case had arisen in the Sixth Circuit petitioners would not have received vacation pay. The petitioners' notion that vacation pay entitlement is the same under all contracts is contrary to the fundamental contract principle that it is the parties, not the courts, that strike the bargain.

IV

The Petitioners' Suggestion That a Special Standard of Review Should be Applied to Unfair Representation Cases is Without Merit

Petitioners argue that in unfair representation cases the district court acts as an arbitrator, and that since an arbitrator's decisions are virtually unreviewable the district court's decision should likewise be unreviewable. This ill-contrived argument, which first saw light in the petitioners' petition for rehearing in the court of appeals, is contrary to petitioners' position in the district court when they argued:

> Number one, the Court having found that there was unfair representation and having set aside the purported settlement agreement, the Court now sits as the trier of fact and law on the whole dispute. . . . The Court having found unfair representation, we are no longer concerned with what an arbitrator would do because we are in Court on it. (March 11, 1977 district court hearing, T.P. 53).

It is also contrary to their initial position in the court of appeals where they argued the Findings should be sustained unless they were clearly erroneous. Brief of Appellees and Cross-Appellants at 16.

It is not surprising that the petitioners do not cite a single judicial opinion, treatise, law review article or anything else that supports their notion. A district court judge is not an arbitrator and rules applicable to arbitration do not apply. The finality of an arbitrator's decision reflects that in arbitration the arbitrator's decision is what was bargained for and review of that decision would frustrate the basic purpose of arbitration which is to dispose of disputes quickly without the expense and delay of protracted court proceedings. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960);

Saxis Steamship Co. v. *Multifacs International Traders, Inc.*, 375 F.2d 577 (2nd Cir. 1967). These policies are inapplicable to appellate review of a district court's decision.

Contrary to the petitioners' contention, the court of appeals did not engage in de novo fact finding. There were no disputes at trial on the hard facts about what happened nor credibility problems about what witness to believe. In reaching its decision the appeals court did not have to re-evaluate the credibility of witnesses because the testimony was not conflicting. It did not have to re-evaluate disputes over what happened or what was said because there was no such disputes. After a careful review of the record it did determine that the factual conclusions reached by the district court were unsupported.

CONCLUSION

For the foregoing reasons the questions presented in the petition are not substantial. The writ of certiorari should be denied.

Respectfully submitted,

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